

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL)
DEVELOPMENT PERMIT ISSUED BY)
MASON COUNTY TO)
STATE OF WASHINGTON,)
DEPARTMENT OF NATURAL RESOURCES,)
STATE OF WASHINGTON,)
DEPARTMENT OF NATURAL RESOURCES,)
Appellant,)
v.)
MASON COUNTY,)
Respondent.)

SHB No. 83-17

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the request for review of a permit condition imposed by Mason County, came before the Shorelines Hearings Board, David Akana (presiding), Rodney M. Kerslake, Nancy R. Burnett, Lawrence J. Faulk at a hearing in Lacey on July 1, 1983.

Appellant was represented by Victoria W. Sheldon, Assistant Attorney General; respondent was represented by John A. Buckwalter, Deputy Prosecuting Attorney.

1 Having heard the testimony, having examined the exhibits, and
2 having considered the contentions of the parties, the Board makes these

3 FINDINGS OF FACT

4 I

5 This matter involves an appeal from a condition imposed on a
6 substantial development permit issued by Mason County ("County") to
7 the State Department of Natural Resources ("DNR").

8 II

9 The County has the primary authority to issue or deny shoreline
10 permits within its geographical jurisdiction.

11 III

12 DNR is the state agency entrusted with the management of the
13 public lands of the state, including the beds of navigable waters.

14 IV

15 On January 7, 1983, DNR applied for a substantial development
16 permit for an on-going deep water disposal site near the northeast
17 entrance to Dana Passage at longitude 122° 50' 30" and latitude
18 47° 11' 00" in Section 31, Township 20 N., Range 12 WWM, in Mason
19 County. With its application, DNR submitted a proposed Declaration of
20 Non-significance ("DNS") and a detailed checklist with attachments.

21 After a hearing on February 28, and a meeting on April 4, before
22 the Mason County Board of Commissioners, a substantial development
23 permit was issued on March 7, 1983, with a condition that "Mason
24 County shall be notified when dumping dredge material and Mason County
25 shall have the first right of refusal if it is not in the best

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1 interest of Mason County." The imposition of the condition resulted
2 in the instant appeal which was filed by DNR on April 8, 1983..

3 By agreement of the parties, the essence of the issues submitted
4 to the Board for decision is whether the County has authority to
5 condition the permit as it did, and whether DNR is the proper party to
6 request a permit.

7 V

8 Deep water disposal of spoils have previously been permitted by
9 the County in 1972 and 1978 at the site. Although there is no dispute
10 as to the suitability of the site for spoils disposal, the County now
11 questions control over the quality of the spoils dumped. The disputed
12 condition is the County's attempt to control spoils quality.

13 VI

14 The DNR issues Deep Water Disposal Permits for a fee to both
15 private and governmental entities at 16 regional salt-water sites.
16 Each site was established to provide a convenient location to major
17 sources of dredged material, to minimize damage to the environment,
18 and to streamline the permit process. Only when no upland sites are
19 available, or when the material is not appropriate for upland
20 disposal, is deep water disposal allowed by DNR. If a dumper is
21 denied the use of the site through the instant permit condition, DNR
22 could (though not necessarily) lose revenue, be impaired in its role
23 to facilitate navigation and commerce, and be impaired in its role as
24 land manager.

VII

Any applicant desiring to dispose of spoils in the water must apply for a permit (33 U.S.C. Section 404) from the U.S. Army Corps of Engineers for each dumping activity. The quality of the material to be dumped can be reviewed by the U.S. Environmental Protection Agency.

The County would have no role in the federal permit considerations. However, the County would have control over the use of the site if a new substantial development permit were required for each dumping activity, or if an appropriate condition were placed on the permit held by DNR. Spoils originating from outside the County's jurisdiction could thereby be controlled.

VIII

The adopted and approved Mason County Shoreline Water Program ("SMP") provides at Section .12.070:

Applications for a substantial development permit shall be made to the Administrator by the property owner, lessee, contract purchaser, other person entitled to possession of the property, or by an authorized agent on a form provided by the Administrator. (Emphasis added.)

Under the heading "Relation of application to property" on the application form is listed four relations: owner, purchaser, lessee, and other. The model form is the same. WAC 173-14-110.

The application form, and WAC 173-14-110, also require the name and address of the owner, if other than the applicant.

The SMP and state regulations allow the owner or its authorized agent to apply for a permit. Either DNR or its authorized agent may apply for a permit for a substantial development on state lands

1 managed by DNR. Thus, if a person is authorized to deposit spoils on
2 state lands by DNR, or if DNR consents to such activity on an
3 application form, there is sufficient compliance with the SMP and
4 state regulations.

5 IX

6 The SMP places the site in a natural environment designation.
7 Regulations for spoils disposal are provided as part of dredging
8 activities. The pertinent provision is:

9 Dredged material, when not deposited on land, shall
10 be placed in spoils deposit sites in water areas to
11 be identified by the county. Depositing of dredge
12 material in water areas shall be allowed only for
13 habitat improvement, to correct problems of material
14 distribution affecting adversely fish and shellfish
15 resources or where the alternatives of depositing
16 material on land are more detrimental to shoreline
17 resources than depositing in water areas.
18 Section .16.170.A.2.f. (Emphasis added.)

19 The application submitted by DNR does not describe the materials
20 to be deposited with sufficient specificity to allow the County, or
21 this Board, to conclude whether the above SMP provision has been met.
22 The materials which could be dredged and deposited on the site by
23 others have not yet been fully identified. Thus, a determination that
24 upland disposal is more detrimental than water disposal cannot be made.

25 X

26 Any Conclusion of Law which should be deemed a Finding of Fact is
27 hereby adopted as such.

From these Findings the Board comes to these

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29 CONCLUSIONS OF LAW & ORDER
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1 CONCLUSIONS OF LAW

2 I

3 DNR has standing to apply for and to receive a shoreline
4 substantial development permit on managed state lands.

5 II

6 It is implicit in the power of any local government in the
7 issuance of a shoreline substantial development permit to add
8 reasonable conditions. See State v. Crown Zellerback, 92 Wn.2d 894
9 (1979).

10 III

11 The burden of showing that a condition placed on a substantial
12 development permit is unlawful or unreasonable is on the appealing
13 party. See RCW 90.58.140(7). The criteria used are the provisions of
14 the SMP and the Shorelines Management Act ("SMA"). RCW 90.58.140(2).

15 IV

16 Under the SMP, each disposal event must be more detrimental to
17 shoreline resources than to water areas before the activity can be
18 allowed in the water. The County cannot properly make that
19 determination with its present information. The DNR has not provided
20 sufficient specificity in its application and supporting documents, or
21 testimony, upon which either the County or this Board could fashion
22 appropriate conditions. The condition added by the County to the
23 instant permit evidences cognizance of the SMP requirement. However,
24 because it was based on no information or data it was, and is,
25 improper. The condition is inconsistent with the SMP.

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V

The permit and application lacks specificity under the particular provision of this SMP. See Hayes v. Yount, 87 Wn.2d 280 (1976). The permit, which is inconsistent with the SMA, should be vacated.

VI

The contentions raised by County relating to WAC 173-14-060 are without merit.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

Shoreline Substantial Development permit No. 314 issued by Mason County to the State Department of Natural Resources is vacated.

DATED this 14th day of July, 1983.

SHORELINES HEARINGS BOARD

David Akana

DAVID AKANA, Lawyer Member

Rodney M. Kerslake
RODNEY M. KERSLAKE, Member

Lawrence J. Faulk
LAWRENCE J. FAULK, Member

Nancy R. Burnett
NANCY R. BURNETT, Member